



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10

1200 Sixth Avenue  
Seattle, Washington 98101

JAN 21 2000

Ken WA 2302  
1-21-00  
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**VIA TELEFAX & CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Mr. John P. Donahue, Senior Vice President,  
General Counsel & Secretary  
Rhodia Inc.  
CN 7500  
Cranbury, NJ 08512-7500

Mr. John M. Iatesta, Assistant Secretary  
Rhone Poulenc Ag Company Inc.  
(Formerly Rhone-Poulenc, Inc.)  
CN 7500  
Cranbury NJ 08512-7500

Mr. Richard Padden, Member  
Container Properties, L.L.C.  
1216 140th Court East  
Sumner, WA 98390

RECEIVED

JAN 25 2000

OFFICE OF WASTE  
& CHEM. MGMT

FILE COPY

Re: Final Decision of Dispute of Demand for Stipulated Penalties  
Administrative Order on Consent for Corrective Action ("Order")  
Docket No. 1091-11-20-3008(h)  
Rhone-Poulenc, Inc., Marginal Way Facility  
WAD 00928 2302

Dear Sirs:

The U.S. Environmental Protection Agency ("EPA") is in receipt of the January 11, 2000 letter from Respondents' legal counsel notifying EPA of Respondents' request that EPA reconsider its Initial Decision. Although this letter was not received by EPA within the time period allowed by the Order, EPA understands that that was because of a mishap with a messenger delivery service. Thus, EPA will consider the submission of Respondents' request as though it was timely, and the time period by which EPA must respond under the Order will run from the date EPA effectively received Respondents' request, which was January 14, 2000.

After careful review and consideration of Respondents' request for reconsideration, EPA's initial decision stands unaltered. EPA asserts that the stipulated penalties demanded are

justified and appropriate given the circumstances presented here, in accordance with the Order, and Respondents have not demonstrated that the stipulated penalties should be reduced.

It is EPA's belief that the goals of corrective action that the Order is in place to achieve will only be achieved if the Order is complied with. It is Respondents' lack of compliance with the Order that is inhibiting the achievement of the goals of the parties as expressed in the corrective action Order. Imposition of stipulated penalties as contemplated by the framework of the Order will deter Respondents from submitting future work plans or reports without carefully reviewing the requirements imposed by the Order, consulting with EPA to the extent such requirements are not completely understood, and reviewing the submission itself carefully to ensure that it meets the requirements prior to submission. Only by conducting work in compliance with the Order will progress at the facility be achieved in a timely manner. This is the framework contemplated by the Order to which the Respondents agreed and they are subject.

EPA does not agree that the facts support that the Respondents demonstrated good faith by their submission of the the various iterations of the Groundwater Monitoring Plan ("GWMP"). Many of the reasons supporting EPA's position are set forth in EPA's demand for stipulated penalties and Initial Decision, but additional reasons are provided below in response to Respondents' letter dated January 11, 2000.

#### Stipulated Penalties are Appropriately Assessed

Respondents misconstrue the Order by interpreting Paragraph 7.3 as somehow supporting their erroneous belief that stipulated penalties do not apply to initial submissions. EPA has already addressed this issue in its Initial Decision and nothing in Respondents' January 11, 2000 letter suggests that EPA should change its perspective.

Paragraph 7.3 pertains to the procedure for submission of documents for EPA approval and does not address the assessment of stipulated penalties. Certainly nothing in Paragraph 7.3 excuses non-compliance with the Order. Rather Section XV addresses stipulated penalties and that Section does not provide Respondents relief from penalties assessed because the deficiencies are in an initial submission.

Respondents suggest that penalties should be calculated only from July 19, 1999, until August 20, 1999. As stated in EPA's Initial Decision, under the terms of the Order, stipulated penalties are to be assessed beginning on the day non-compliance occurred and ending on the final day of correction of the non-compliance. The non-compliance began on the date of the initial submission of the GWMP (March 22, 1999), and the non-compliance was not corrected until EPA issued its approval of the GWMP with modifications on September 29, 1999. The August 20, 1999 GWMP could not have been approved without the modifications EPA made in its September 29, 1999 letter. Nonetheless, EPA has already substantially reduced the amount that Respondents could have been subject to under the agreed Order by calculating the penalties

from the date of EPA's comments on the March 22, 1999 GWMP which was June 16, 1999, and terminating the penalty calculation on August 20, 1999. Although Respondents have repeatedly claimed that they believed that they had responded to EPA's SOW and comments in their July 19, 1999 GWMP, the undisputed fact is that they did not.

Respondents' Good Faith Has Not Been Demonstrated

EPA disagrees that Respondents have demonstrated that they acted in good faith in responding to the SOW and subsequent comments from EPA regarding the GWMP. Good faith in this context, i.e., the performance or enforcement of a contract, "relates to the faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." Restatement of Contracts (Second) § 205 cmt. a (1981). Respondents' belief that they complied, when they in fact did not, does not demonstrate consistency with the justified expectations of EPA in this case. Those expectations include submitting plans that comply with the SOW and the Order. As demonstrated by EPA's comments on each iteration of the GWMP, but especially those on the March 22, 1999 iteration, Respondents did not do that.

Respondents Never Submitted an Acceptable Groundwater Monitoring Plan

EPA declines to address each aspect of Respondents' restatement of whether each iteration of the GWMP met the requirements of the SOW and EPA's subsequent comments.<sup>1</sup> Suffice it to say that there is no question that the July 19, 1999 GWMP was closer to meeting the requirements of the SOW than Respondents' initial submission. There is also no question, however, that the July 19, 1999 GWMP, like the March 22, 1999 GWMP, still did not comply fully with the SOW. In addition, there is no question that the August 20, 1999 GWMP still did not meet all of the requirements of the SOW, hence EPA's modification of that GWMP in its September 29, 1999 letter. Although some effort was made on the part of Respondents to improve the GWMP, the continuing failure of the Respondents to provide a plan that complied with the requirements in the SOW and the Order was so egregious that a further reduction in the penalties imposed is not justified.

The Modifications in EPA's September 29, 1999 Letter are Tied to the Requirements in the SOW

With regard to the claim that the EPA's September 29, 1999 approval with modifications

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<sup>1</sup>EPA will address, however, Respondents' claim that one of EPA's example of failure to comply with the SOW is confusing because it's unclear whether the March 22, 1999 GWMP or the July 19, 1999 GWMP was being referred to by EPA. EPA regrets any confusion caused by the language, but the penalties imposed are warranted. There is no dispute that the July 19, 1999 GWMP complied with many of the elements of the SOW, but there were still deficiencies as is demonstrated by the record.

of the GWMP contained new requirements, EPA disagrees. Regarding the sampling schedule and schedule for groundwater monitoring reports, EPA directs Respondents to item number 5 in the SOW. Schedules are a critical element of any workplan. Work plans, once approved in accordance with the Order, are the mechanism by which the work is conducted. If an approved workplan contains language that is unclear, for example, a time period without a triggering event that begins that time period, then the time period is essentially meaningless. It certainly does not serve the purpose of a schedule, which is a necessary element of any plan in order to ensure progress and retain the enforceability of the Order.

The modification requiring the report to include how the tidal stages will be estimated follows directly from the general objectives of the SOW for both groundwater monitoring and the tidal study and certainly does not go beyond the SOW. Inclusion in the report of the methodology used to estimate the tidal stage is an important aspect of understanding the results of the groundwater monitoring and ensuring its reliability. Although Respondents claim that the methodology would be a standard constituent of any technical report, EPA could not rely on that possibility. In fact, if the methodology were not included, and this modification had not been made to the GWMP, EPA may have had no recourse.

We disagree with your recollection of EPA's communications in early August regarding investigation derived wastes, and we disagree that the June 16, 1999 comments are unclear on this issue. EPA is unsure why Respondents believed that the language they proposed might be acceptable at all; EPA is unaware of any policy regarding treatment of IDW at the facility that supports the language in Respondents' GWMPs. Respondents did not adequately respond to EPA's comment 17 in the June 16, 1999 letter in their July 19, 1999 GWMP or the August 20, 1999 GWMP. In addition, regardless of Respondents belief regarding any policy, or the outcome of any application to Ecology regarding a "contained-in determination", any reference to the land disposal restrictions was notably and disconcertingly absent from the GWMP.

### Conclusion

EPA's policies set forth its belief that stipulated penalties serve to deter Respondents from submitting inadequate work products and delaying the progress of work. EPA does not agree that the imposition of these penalties will interfere with the work required at this facility. In fact, EPA believes that Respondents may be less likely to submit deliverables in the future that do not meet essential basic requirements. Progress is likely to be enhanced because Respondents will likely take greater care in reviewing the requirements and reviewing their documents prior to submitting them to EPA. If Respondents do not, they act knowing that EPA will not hesitate to impose stipulated penalties if warranted.

While the groundwater monitoring is ongoing, additional elements of corrective action will be performed in accordance with the Order at the facility. These elements include the Corrective Measures Study and the implementation of the selected corrective measures. EPA

needs to ensure that the Respondents have an understanding that EPA intends to enforce the terms of the Order where appropriate. EPA does not disagree that the process entails some "fleshing out" by the Respondents of requirements specified by EPA, and had the GWMP not contained so many major deficiencies, EPA may have chosen not to assess stipulated penalties.

Contrary to Respondents belief, EPA does not expect the imposition of these penalties to "strain relations" with the Respondents. The staff assigned to this matter will continue to review the work submitted by Respondents in the same light they review work submitted by other Respondents on other matters. The assessment of penalties will not alter their approach. EPA's goal is simply to achieve progress at this facility and we believe the imposition of penalties will facilitate that goal.

In accordance with Paragraph 15.6, Respondents should remit a certified or cashier's check made payable to the Treasurer of the United States of America within seven (7) days of receipt of this decision to:

U.S. Environmental Protection Agency  
(Region 10 Hearing Clerk)  
P.O. Box 360903  
Pittsburgh, Pennsylvania 15251

Copies of the check and letter transmitting the check shall be sent simultaneously to the EPA Project coordinators at:

U.S. Environmental Protection Agency  
Region 10 (WCM-121)  
Office of Waste and Chemicals Management  
1200 Sixth Avenue  
Seattle, Washington 98101

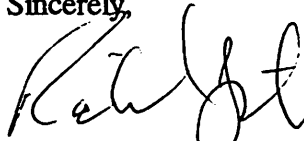
and to the Regional Hearing Clerk at:

U.S. Environmental Protection Agency  
Region 10 (ORC-158)  
1200 Sixth Avenue  
Seattle, Washington 98101

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If you have legal questions regarding this matter, please have your attorney contact Jennifer G. MacDonald, Assistant Regional Counsel, at (206) 553-8311. For any questions of a technical nature please contact Kim Ogle at (206) 553-0955. In accordance with the Order, this letter constitutes EPA's decision of this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Richard Albright', written over a horizontal line.

Richard Albright

Director

Office of Waste and Chemicals Management

Enclosure

cc: D. Verfurth, Carney, Badley, Smith & Spellman  
P. Wold, RCI Environmental  
M. Smith, AGI Technologies  
C. Blumenfeld, Perkins Coie  
B. Maeng, Ecology, NWRO

James J. Dragna  
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June 17, 2010

RECEIVED  
JUN 22 2010  
Office of Air, Waste & Toxics

**Via E-Mail and U.S. Mail**

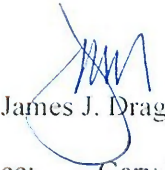
Christy Brown  
Project Manager  
Office of Air, Waste and Toxics  
U.S. Environmental Protection Agency Region 10  
1200 Sixth Avenue, Suite 900  
Seattle, WA 98101-3140

**Re: Informal Dispute of Request for Additional Work  
AOC for Corrective Action under RCRA  
Docket No. 1091-11-20-3008(h)  
Rhône-Poulenc Inc. Marginal Way Facility  
WAD 00928 2302**

Dear Ms. Brown:

We have received your letter of June 1, 2010 requesting confirmation of our availability for various dates to meet with you to discuss the Marginal Way facility. Rhodia Inc. and we are available on any of the dates and times proposed in your letter (i.e., July 6th, July 8th or July 12th), and would appreciate the opportunity to meet with you. We understand Container Properties may have communicated its unavailability for those dates, but we would still be happy to meet with you in July if you think it is appropriate. Please let us know what dates work best for EPA, and we will make arrangements to meet with you at your offices.

Very truly yours,

  
James J. Dragna

cc: Gary Dupuy, AMEC Geomatrix  
Glen St. Amant, Muckleshoot Tribe  
Marla Steinhoff, NOAA  
Byung Maeng, Ecology NWRO  
David Blount, Esq., Landye Bennett Blumstein LLP  
Eric Merrifield, Esq., Perkins Coie  
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Paul Linskey, Esq., Rhodia Inc.

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